

ROBERTS AND KOCH

IBLA 85-562

Decided January 16, 1987

Appeal from a decision of the Arizona State Office, Bureau of Land Management, dismissing a protest against issuance of an oil and gas lease to the applicant drawn with first priority pursuant to simultaneous drawing provisions of 43 CFR 1821.2-3.

Affirmed.

1. Acquired Lands

Land acquired by the United States does not become public land by the mere process of its acquisition, and, in the absence of specific legislative or other authoritative direction to the contrary, is not subject to leasing under the mineral leasing laws until the Department formally opens such land for disposition.

2. Acquired Lands -- Oil and Gas Leases: Acquired Lands Leases -- Oil and Gas Leases: Applications: Filing -- Oil and Gas Leases: Lands Subject to -- Oil and Gas Leases: Noncompetitive Leases

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

APPEARANCES: Robert C. Bledsoe, Esq., and W. Kent Bickham, Esq., Midland, Texas, for appellant; Fritz L. Goreham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Roberts and Koch has appealed from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated April 3, 1985, dismissing its protest against issuance of an oil and gas lease to the applicant receiving first priority pursuant to a simultaneous drawing held on March 12, 1985.

The land subject to this appeal, located in sec. 16, T. 11 S., R. 24 W., Gila and Salt River Meridian, Yuma County, Arizona, was granted to the State of Arizona pursuant to an act of Congress dated June 20, 1910. The State of Arizona conveyed the E 1/2 of fractional sec. 16 to private individuals, reserving a one-sixteenth interest in all mineral rights to that land. By deed dated September 17, 1976, the United States acquired from those individuals title to the E 1/2 of sec. 16, including the fifteen-sixteenths interest in all mineral rights, pursuant to the Colorado River Basin Salinity Control Act of June 24, 1974, 43 U.S.C. §§ 1571-1599 (1982), which authorizes the acquisition of lands for the construction, operation, maintenance, and control of well fields, for use in connection with the Colorado River Basin Salinity Control Program, and for such other uses as may be authorized by law.

On October 30, 1984, John J. Karabees, President of AZTX Exploration, Inc., as representative of Roberts and Koch, requested that BLM open the E 1/2 of sec. 16 to oil and gas leasing, providing documentation that the United States had acquired the land and rights to fifteen-sixteenths of the minerals located therein.

BLM published an "Order Providing for Opening of Lands to Entry," in the Federal Register on January 29, 1985, affecting the following land: Sec. 16, lots 3 and 4, NE 1/4 N 1/2 SE 1/4, T. 11 S., R. 24 W., Gila and Salt River Meridian, Yuma County, Arizona. That order, which is challenged as invalid by appellant, set forth procedures for determining priority among offers to lease such land for oil and gas:

At 9 a.m., on March 5, 1985, the land described [above] shall be open to mineral leasing under the Acquired Lands Mineral Leasing Act of August 7, 1947 (30 U.S.C. 351), et seq., subject to valid existing rights, the provisions of existing withdrawals and the requirements of applicable law. No applications will be accepted prior to March 5, 1985. All applications received on March 5, 1985 prior to 9 a.m., will be considered as simultaneously filed as of 9 a.m. on March 5, 1985 and a drawing will be held in accordance with 43 CFR 1821.2-3, if necessary. Those received after 9 a.m. shall be considered in the order of filing.

50 FR 3980 (Jan. 29, 1985).

On March 7, 1985, a correction notice was published in the Federal Register which corrected the date of the notice to read January 22, 1985, rather than January 22, 1984, and amended the "second sentence" of the above-quoted paragraph to read: "All applications received prior to 9 a.m. March 5, 1985, will be considered as simultaneously filed as of 9 a.m. on March 5, 1985 and a drawing will be held in accordance with 43 CFR 1821.2-3, if necessary." 50 FR 9328 (Mar. 7, 1985).

Six applications to lease the subject land were filed by 9 a.m., March 5, 1985, and a simultaneously drawing was held on March 12, 1985, to determine their priority. Application A 20654, filed by Ronald Hanna, was

accorded first priority, while appellant's application A 20593 received fourth priority. Appellant's application, filed January 31, 1985, was the first one filed.

By letter dated March 20, 1985, appellant stated that it had filed the "first Application for this land" and objected to the consideration of a "subsequent application" for leasing. Appellant requested a decision or order explaining the "rejection" of its application.

BLM treated appellant's March 20, 1985, letter as a protest, and on April 3, 1985, rendered a decision dismissing that protest. BLM noted that the subject land had been acquired by the United States pursuant to the Colorado River Basin Salinity Control Act, and applied the rule that "[t]he acquisition of the lands did not of itself open the lands to mineral leasing." Rather, BLM stated that the lands were not open to leasing until March 5, 1985, in accordance with the opening order, as amended. In its decision, BLM described the promulgation and the contents of the opening order and rejected appellant's argument that the simultaneous drawing provisions described under 43 CFR 1821.2-3 were inapplicable to the subject lands.

Appellant's statement of reasons amplifies its objection to the procedures followed by BLM in leasing the subject lands. Appellant's argument begins with a construction of key sections of the Mineral Leasing Act for Acquired Lands of August 7, 1947 (MLAAL), as amended, 30 U.S.C. §§ 351-359 (1982). Section 351 defines "acquired lands" as "all lands heretofore or hereafter acquired by the United States to which the 'mineral leasing laws' have not been extended," and section 352 provides in relevant part:

[A]ll deposits of * * * oil [and] gas * * * which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States * * * may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws.

Appellant states that "[n]o other provision of the MLAAL limits the broad declaration that all acquired lands are available for oil and gas leasing" (Statement of Reasons at 4 (emphasis in original)). Appellant correctly notes that the "leasing provisions of the mineral leasing laws" referred to in section 352 of MLAAL are essentially those of the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181-193a, 223-236b (1982). Appellant refers specifically to 30 U.S.C. § 226(a) (1982), which provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary," and to 30 U.S.C. § 226(c) (1982), which provides:

If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding.

Appellant maintains that these provisions of MLAAL and MLA, as well as the regulations promulgated pursuant to those statutes, do not limit the "availability of acquired lands for oil and gas leasing," and that "acquired lands are available for oil and gas leasing from the time they are acquired" (Statement of Reasons at 4-5). Moreover, appellant correctly points out that while the Secretary has broad authority to withdraw publicly owned lands under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1982), the subject land has not been withdrawn by the Secretary, an act of Congress, or Presidential order. Appellant argues that it, as the qualified person first making application, should have the lease. Appellant asserts that since the land was never withdrawn, it was available for oil and gas leasing when it filed its application, without the necessity of an entry order, and concludes that "[t]here is no statute or regulation that provides for the necessity of an entry order" (Statement of Reasons at 7).

In its answer, BLM sets forth the distinction between "public land," and "acquired land." The former is defined as "government-owned land which was part of the original public domain, while "acquired land" is "land obtained by the United States through purchase or transfer from a state or a private individual and normally dedicated to a specific use" (Answer at 1-2). Counsel for BLM asserts that BLM properly recognized this distinction: "The fact that the lands were reacquired does not in and of itself restore them to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for a specific purpose." Quoting Rawson v. United States, 225 F.2d 855, 858 (9th Cir. 1955).

[1] Appellant's argument that "acquired lands are available for oil and gas leasing from the time they are acquired" involves a disregard of the basic distinction between "acquired lands" and "public lands." That distinction is "not one of use but, rather, one of origin of title in the United States." Bobby Lee Moore, 72 I.D. 505, 508 (1965). Land loses its public domain status when the United States parts with title to such land. As was stated in Bobby Lee Moore, *supra* at 509:

It does not follow, however, that upon the revesting of title in the United States to land which once formed part of the public domain the land again becomes public domain. On the contrary,

It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses * * * Rawson v. United States, 225 F.2d 855, 858 (9th Cir. 1955). [Emphasis added.]

Contrary to appellant's position, the land subject to this appeal did not become available for oil and gas leasing from the time it was reacquired by the United States. The Colorado River Basin Salinity Control Act, 43 U.S.C.

§ 1571 (1982), the authority under which the United States reacquired the subject lands, does not remove them from the classification of those acquired for special uses, and there is no "authoritative direction" which does so. The mere acquisition of the lands deemed necessary to carry out the purposes of the Colorado River Basin Salinity Control Act did not "restore" them to the public domain.

Appellant argues that the practice followed by BLM in opening the lands to oil and gas leasing is without basis. BLM relies upon Petro Leasco, Inc., 42 IBLA 345 (1979) as authority for its approach. In that opinion, the Board ruled that "[i]t is the practice of the Department that public lands reacquired by exchange and administered by BLM are not available for entry, sale, location, or leasing until opened to such appropriation, and until such availability is duly noted on the public land records." Id. at 352 (emphasis in original). The Board examined the legislative history of FLPMA and "discerned nothing * * * which arguably suggests congressional intent to abolish the Department's administrative practice of issuing restoration and opening orders." Id. at 353. Further, the Board quoted at length from the decision of the Assistant Secretary in Earl Crecelouis Hall, 58 I.D. 557 (1943), in which appellant's homestead application under 43 U.S.C. § 315f (1982), was rejected on the basis that the subject lands had been acquired by the United States from a railroad company under the Transportation Act of September 18, 1940, 54 Stat. 954, but were not subject to the public land laws. The Earl Crecelouis Hall opinion squarely addresses the arguments presented by appellant:

Upon the Secretary's approval of the instrument [railroad's release of odd section land grant] the two withdrawals * * * were in effect lifted and the lands, released from all claims, immediately regained the status of vacant, unappropriated, public lands. But this restoration of the tracts to the public domain did not eo instanti make them subject to classification and disposal. * * *

Through the years, the Office and the Department have had frequent occasion to consider the status of restored lands -- lands once segregated by various kinds of adverse claims or appropriations, even those of patent, and restored to the United States by congressional act, by court decision, by individual relinquishment, by land office cancellation or by revocation of some withdrawal, Executive or departmental. In a long line of decisions in such cases, the Department has held that although restored lands become part of the public domain immediately, it remains for the Department and it alone in the absence of congressional direction to give the "indication" spoken of by the [C]ourt and to determine when and how such lands shall be opened for disposal.

Not only this. The Department has also held that orderly administration of the land laws forbids any departure from the salutary rule that lands which have once been segregated from the public domain, whether by entry, patent, reservation, selection

or otherwise, shall not be subject to any form of appropriation until the local land officers * * * shall have entered upon the records of the local office proper notation of the restoration. [Citations omitted.]

58 I.D. at 559-60.

The Board in Petro Leasco reasoned that lands acquired by exchange under the National Forest Act become part of the National Forest system, and upon acquisition become subject to all applicable laws and regulations; those lands are by statute open to mineral leasing. See 30 U.S.C. § 181 (1982). Thus, lands acquired through exchange under the Forest Exchange Act are subject to the sort of "legislative directive" mentioned by the Rawson court. ^{1/} However, in the absence of such a legislative or authoritative directive, all other reacquired lands, whether by exchange or otherwise, are not "available for entry, sale, location, or leasing until opened to such appropriation, and until such availability is duly noted on the public land records." 42 IBLA at 352.

We agree with counsel for BLM that the Petro Leasco decision accurately reflects longstanding Departmental practice in administering acquired lands, and that nothing in the MLAAL or the MLA requires a contrary or different approach. Appellant maintains that Petro Leasco is inapplicable because appellant's lease application embraces lands which were "not acquired by exchange and have no connection with the Forest Exchange Act" (Statement of Reasons, at 8). However, appellant's reading of that decision ignores its treatment of the broader question as to whether restoration or opening orders are necessary before acquired lands are available for disposition under the public land laws. We are bound by the Board's answer to that question: "[A]cquired lands administered by BLM are not subject to appropriation unless and until opening orders are duly noted on the land records * * *." 42 IBLA at 354.

Appellant contends that even if Petro Leasco requires that the availability of land for oil and gas leasing be noted on BLM's plat and tract book records before offers to lease can be accepted, such requirement was met in this case. In support of this argument, appellant submits an affidavit executed by John J. Karabees, representative of appellant, which states:

^{1/} See also Texas Oil & Gas Corp. v. Watt, 683 F.2d 427 (D.C. Cir. 1982), in which the court of appeals ruled that the Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), which removed the exclusion of military lands from oil and gas leasing under the MLAAL, amounted to a legislative restoration of those lands to the public domain, thus reversing the district court in Texas Oil & Gas Corp. v. Andrus, 498 F. Supp. 668 (D.D.C. 1980). Accordingly, the Secretary improperly cancelled leases issued under the MLAAL on the basis that the subject lands had not been made subject, or restored, to the operation of the public land laws under 43 CFR 2091.1. Thus, under Texas Oil & Gas Corp. v. Watt, supra, an opening order would have been unnecessary to restore the military lands to the public domain, since the 1976 amendments to the MLAAL constituted a legislative directive that they be restored.

I personally examined the BLM plat and historical index records prior to this filing and saw that the United States' ownership of the minerals had been duly noted on each prior to the time of such filing and no withdrawal or reservation was noted on either the plat or historical index.

Our above analysis reveals the error of appellant's position. The ownership of the lands by the United States is not a subject of dispute; the United States acquired title to the lands on September 17, 1976, and apparently, BLM noted that fact on the appropriate land records. However, not until BLM promulgated an opening order and noted it on the public land records did the lands become available for leasing under the MLAAL and the MLA.

The Departmental regulations countenance the procedures followed by BLM in publishing an order which opens acquired lands to oil and gas leasing. Nevertheless, appellant objects to the use of simultaneous drawing procedures to establish priority among the six offers to lease filed prior to March 5, 1985. Because appellant's offer was filed first in time, appellant insists that it should have been awarded the lease as the first-qualified applicant. In effect, appellant challenges the Department's simultaneous drawing procedures as applied to acquired lands. We must reject appellant's challenge to those procedures. The noncompetitive oil and gas lease regulations, 43 CFR Subpart 3110, including the regulations setting forth the simultaneous drawing procedures, apply to "[o]il and gas in public domain lands." See 43 CFR 3100.0-3(a)(1). Acquired lands, once restored to the public domain upon the publication of an opening order and its notation on the public land records, must be leased in accordance with those regulations. BLM acted in accordance with 43 CFR 3111.1-1(b), which disposes of this facet of appellant's appeal:

(b) Priority of an offer received over-the-counter shall be determined as of the time and date the offer is filed in the proper BLM office. Offers to lease which are received in the same mail or over-the-counter at the same time, or during the period established by an opening order or similar notice shall be considered as having been filed simultaneously. Priority of the offers to the extent of the conflicts between them shall be determined by drawing in accordance with § 1821.2-3 of this title. [Emphasis added].

The opening order published by BLM on January 29, 1985, places the six applications filed by 9 a.m., March 5, 1985, within 43 CFR 1821.2-3: "Two or more documents are considered as simultaneously filed when * * * [t]hey are filed pursuant to an order which specifies that documents delivered to and received by the proper office during a specified period shall be considered as simultaneously filed."

We conclude that the acquired lands subject to this appeal were not open to oil and gas leasing until BLM promulgated an opening order and noted it on the land records, and that BLM properly determined priority among the six lease offers filed by March 5, 1985, in accordance with 43 CFR 3111.1-1. Therefore, BLM properly dismissed appellant's protest.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge.

